Supreme Court, U.S.
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No. 93-1796

In The

Supreme Court of the United States

October Term, 1993

LARRY HOLMBERG
AND THE AMUSEMENT CENTER, INC.,
A MINNESOTA CORPORATION,

Petitioners,

vs.

CITY OF RAMSEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does City of Ramsey Ordinance No. 90-23, which regulates the location of adult uses in the City, violate the content-neutral standard merely because the Ordinance contains a specific timeframe under which pre-existing adult uses must relocate if they are not in compliance with the Ordinance?

2. Does Ordinance No. 90-23 provide for reasonable alternative avenues of communication?

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For The Eighth Circuit

BRIEF IN OPPOSITION

The Respondent City of Ramsey ("City") respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the Eighth Circuit Court of Appeals in this case. The Eighth Circuit opinion is reported as *Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1993) and is set forth in the appendix at A-509 to A-516. In its decision, the Eighth Circuit affirmed the ruling of the United States District Court for the District of Minnesota, reported as *Schneider v. City of Ramsey*, 800 F. Supp. 815 (D. Minn. 1992), which

is set forth in the appendix at A-451 to A-468. The Petition should be denied because the Eighth Circuit opinion is consistent with the opinions of this Court and the opinions from the United States Courts of Appeals.

STATEMENT OF THE CASE

On November 13, 1990 the City adopted Ordinance No. 90-23 (the "Ordinance"). A-16. The Ordinance regulates the location of adult uses in the City by allowing them to be located in commercial zoning districts, provided that the adult use is not located within 1000 feet of another adult use or within 1000 feet of certain specified uses. A-31. Pre- existing adult uses that did not comply with the location requirements of the Ordinance were allowed to remain in their existing location until January 31, 1992. A-62. The owner of an adult use could request an extension of that time, but failure to submit a timely extension application would constitute a waiver of the right to request an extension of the deadline. A-62 to A-63.

Petitioners opened an adult use in the City on or about April 19, 1990. A-453. The location of the adult use did not comply with Ordinance No. 90-23 because it was located within 1000 feet of a daycare center, a church, residentially-zoned property, and an on-sale liquor establishment. A-453. Petitioners did not relocate their business before January 31, 1992 and did not request an extension of that deadline. A-458.

Petitioner Holmberg purchased the property for $140,000 in February 1989. A-453. In April 1990, Mr.

Holmberg's bank appraised the property at $168,000. A-454.

Prior to adopting Ordinance No. 90-23, the City retained a professional planner as a consultant to review the issue of adult use regulation and to advise the City. A-455. As part of his duties, the consultant reviewed reports addressing secondary effects of adult uses from various other cities, including Seattle, Phoenix, Indianapolis, Minneapolis, St. Paul, and Renton, Washington. A-455. The consultant also reviewed numerous other reports, including the report from the Minnesota Attorney General regarding regulation of adult-only businesses. A-455. The consultant also relied upon information obtained by the City's Police Department and from public hearings conducted by the City Council. A-456. Based on the work done by the consultant, the City Council concluded that adult uses, such as the one operated by petitioners, had the potential to create adverse secondary effects, including increased crime, increased health risk, diminished property values and general property blight. A-68 to A-77; A-456.

In addition to the amortization provision pertaining to adult uses, Ordinance No. 90-23 also contained an amortization provision dealing with nonconforming uses other than adult uses. The Ordinance allowed such uses to continue unless there was a documented study demonstrating that the particular use posed a danger or threat to the health, safety and welfare of the City, in which case an amortization period of up to five years was permitted. A-28 to A-29.

The City contains approximately 18,500 acres, 4,800 of which are located in what is known as the general urban area and 13,700 of which are located in the rural area. A-459 to A-460. Approximately 12% of the City's land area is zoned for commercial and industrial uses. A-460. The City is an outer-tier suburb of Minneapolis with a population of approximately 14,000. A-459. It contains large agricultural sections in addition to residential subdivisions. A-459.

The total acreage of land in the City that is available under Ordinance No. 90-23 for adult uses ("opportunity area") is 466, or approximately 2.5% of the total land area. A-466. Approximately 9.7% of the general urban area in the City is available for adult uses to locate; of the land zoned for commercial purposes, approximately 35% is available for adult uses. A-460.

It would cost approximately $123,600 for someone to purchase a one-acre lot in the opportunity area and build a 2,400 square foot structure, which is the approximate size of petitioners' current business. A-460. It would cost approximately $170,000 to purchase a five-acre lot, subdivide it into five one-acre parcels and build a comparable structure. The remaining four acres could be resold for approximately $48,000. A-460.

REASONS FOR DENYING THE PETITION

The Court should exercise its discretion by not granting the Petition because there are no "special and important reasons" for granting it. Sup. Ct. R. 10.1. The Eighth Circuit decision neither conflicts with a decision from this

Court nor with decisions of other United States Courts of Appeals on the same matter. *Id.* 10.1(a). Because the case does not meet the standard established by the Court for granting review on Writ of Certiorari, the Petition should be denied.

I. THE EIGHTH CIRCUIT DECISION UPHOLDING THE CONSTITUTIONALITY OF ORDINANCE NO. 90-23 IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

A. Ordinance No. 90-23 Does Not Conflict With The Content-Neutral Standard Of The First Amendment Simply Because The Ordinance Contains A Specific Amortization Period For Adult Uses.

Petitioners do not seek to challenge the reasonableness of the amortization period. Instead, they contend that the amortization clause reveals an intent to restrain speech because adult uses are the only types of nonconforming uses that have a specified amortization period. (Petition, at 12). They contend that the Eighth Circuit decision on this issue conflicts with applicable decisions from other circuits and this Court because:

1. The Eighth Circuit ignored the fact that in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court was dealing with situations in which cities were considering only prospective ordinances, not the elimination of existing businesses; (Petition, at 14)

2. The amortization period also governs adult uses–accessory for which there has been no documented study by any city showing that such uses have secondary adverse effects; (Petition, at 16)

3. The decision conflicts with *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); (Petition, at 17) and

4. The amortization clause creates an irrebutable presumption; (Petition, at 18).

For the reasons set forth below, petitioners' arguments on each of these points is without merit.

A content-neutral regulation is one that is "justified without reference to the content of the regulated speech." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Courts will not strike down an ordinance or statute on the basis of an alleged illicit legislative motive. *United States v. O'Brien*, 391 U.S. 367, 383 (1968). What motivates one legislator to adopt a statute does not necessarily motivate another, and the court should refrain from guesswork. *Id.*

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court set forth the standard by which zoning regulations pertaining to adult uses would be governed. In *Young*, the Court concluded that the mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other requirements is not a sufficient reason for invalidating those ordinances. *Young*, 427 U.S. at 62. Reasonable regulations of the time, place and manner of protected speech,

where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. *Id.* at 64.

In *Renton*, the Court upheld the constitutionality of an ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or within one mile of any school. Before adopting the ordinance, the City Council held public hearings, reviewed the experience of Seattle and other cities pertaining to adult businesses, and received a report from the city attorney. The Court concluded that the ordinance was a content-neutral one that placed reasonable time, place and manner regulations and was constitutional because it was designed to serve a substantial government interest and did not unreasonably limit alternative avenues of communication. *Renton*, 475 U.S. at 47.

In their argument, petitioners contend that the Eighth Circuit applied an erroneous legal standard for determining whether the City's adult use ordinance was adopted for a legitimate purpose. Petitioners' argument boils down to a single contention: as justification for its amortization provision, the City should not be able to rely upon studies in other cities which show that adult uses cause adverse secondary effects; instead, the City should be required to establish that petitioners' business actually caused adverse secondary effects before requiring the business to relocate. This is simply not the law–not in any Circuit Court of Appeals and not in the Supreme Court. In addition, petitioners' reliance on the Ninth Circuit Court of Appeals in *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988) is misplaced.

In *Renton*, the Supreme Court held that a city is not required to conduct new studies specific to its locality, so long as "whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. Nothing in the Court's decision restricts that holding to cases that do not involve existing adult use establishments or, for that matter, to free speech cases. The same holding would apply, for example, if a city with an existing nuclear testing laboratory near a residential area was considering whether to require locational restrictions for facilities that use radioactive materials. If studies conducted by other cities showed that such facilities present hazards to persons living in residential areas, the city could rely on those studies to adopt zoning restrictions and amortization provisions. A city should not have to wait for an accident to happen before requiring the laboratory to relocate. Indeed, Circuit Courts have uniformly upheld ordinances like the City's, even if the ordinance impacted existing uses. *See, e.g., Lakeland Lounge, Inc. v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1845 (1993) (six existing businesses); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1271 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) (23 existing businesses); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

The *Walnut Properties* case, upon which petitioners rely, did not hold that application of an amortization provision to an existing business without an independent study is evidence of an improper purpose. In fact, in *Walnut Properties*, the court did not even address the issue of improper purpose. *Walnut Properties*, 861 F.2d at 1107. The language

quoted by petitioners relates to an entirely different issue–whether the plaintiff had a reasonable opportunity to operate an adult theater in the city. *Id.* at 1110.

Ordinance No. 90-23 expressly states that it is intended to ensure that adverse secondary effects associated with adult uses do not contribute to criminal activity or blighting or downgrading of surrounding property in the area of adult uses. The City Council reasonably concluded, based upon numerous studies before it at the time it adopted the Ordinance, that adult use establishments cause such secondary effects. The amortization provision logically and rationally furthers the purposes of the Ordinance by requiring existing adult use establishments to relocate to areas where the adverse effects of their businesses can be controlled or minimized. In addition, the district court found that petitioners' business had caused actual adverse secondary effects since the adoption of the Ordinance. *Schneider v. City of Ramsey*, 800 F. Supp. 815, 820 (D. Minn. 1992). Enforcement of the amortization provision against petitioners will directly further the stated purpose of the Ordinance.

Petitioners' contention that the inclusion of adult uses-accessory in the amortization clause conflicts with other decisions of this Court and the Circuit Courts is without merit. In addition, petitioners do not have standing to raise that argument.

The definition of adult uses-accessory in Ordinance No. 90-23 covers businesses that have 10% or less of their stock in trade allocated to adult uses or 20% or less of their gross receipts derived from movie rentals or magazine sales of adult material. A-20. Petitioners

acknowledged to the trial court that they did not have standing to challenge the adult uses-accessory provision of the Ordinance. A-462 n.3. Even if petitioners had standing to raise that argument, the Eighth Circuit decision does not conflict with any opinions of this Court or other Circuit Courts. Petitioners cite no Circuit Court or Supreme Court decisions on this issue. Instead, they cite two state court decisions, *World Wide Video v. City of Tukwila*, 117 Wash. 2d 382 (1991), *cert. denied*, 112 S. Ct. 1672 (1992) and *Kuhns v. Board of Supervisors*, 128 Cal. App. 3d 369 (1982). In addition, they cite one United States District Court decision, *Wolff v. City of Monticello*, 803 F. Supp. 1568 (D. Minn. 1992).

Petitioners' reliance on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) is misplaced because in that case, the Court concluded that the St. Paul ordinance was content-based, rather than content-neutral. In this case, the trial court found that the Ordinance was not content-based because of the findings adopted by the City Council and its reliance upon the study conducted by its consultant. As stated by the trial court: "There is no direct evidence that the City intended to limit the content of plaintiffs' speech, nor is there indirect evidence from which any such intent may be inferred." A-462.

Petitioners' contention that Ordinance 90-23 creates an irrebuttable presumption, thereby violating the principles established in *Vlandis v. Kline*, 412 U.S. 441 (1993); *Stanley v. Illinois*, 405 U.S. 645 (1972); and *Cleveland Bd. of Education v. La Fleur*, 414 U.S. 623 (1974) is also without merit. In each of those cases, the Court invalidated irrebuttable presumptions

restricting a constitutional right. In contrast, the amortization period in Ordinance No. 90-23 does not create an irrebuttable presumption. Ordinance No. 90-23 permitted non-conforming adult uses to seek an extension based on specific criteria. A-34 to A-35. Petitioners chose not to request such an extension.

B. Ordinance No. 90-23 Allows For Reasonable Alternative Avenues Of Communication.

Petitioners contend that certiorari should be granted because Ordinance No. 90-23 does not provide petitioners with a reasonable alternative avenue of communication. In support of their argument, petitioners contend that the Ordinance grants unbridled discretion to the City Council as to whether petitioners' business can be relocated and that the Ordinance does not provide sufficient land for relocation. (Petition, at 21-25). Neither one of these arguments has any merit.

1. The Ordinance does not grant unbridled discretion to the city council

Petitioners' assertion that market forces may require them to obtain subdivision approval and that the City's subdivision ordinances give officials unbridled discretion to deny petitioners' subdivision request based on the content of their wares is not only speculative and remote, it is legally unsupportable. A subdivision request that complies with subdivision requirements may not be denied. *Odell v. City of Eagan*, 348 N.W.2d 792 (Minn. App. 1984). Petitioners' paranoid and unsubstantiated fears that city officials would unlawfully deny petitioners' subdivision request does not justify striking down the Ordinance, which does not give city officials such discretion.

Contrary to petitioners' assertion, the Eighth Circuit's decision does not conflict with *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395 (1992). In that case, the Court struck down as facially invalid an ordinance that expressly gave city officials discretion to determine whether certain First Amendment activities would be permitted. That case has no application here. The Ordinance does not, on its face, give any city official discretion to determine where an adult use may be located.

2. The Ordinance provides ample opportunity in the City for an adult use to locate

Petitioners' contention that there are no reasonable alternative sites to locate their adult use in the City is not supported by the facts of the case. Petitioners' main contention is that because only 2.5% of the entire land area of the City is available, they do not have sufficient area in which to relocate. What petitioners ignore, however, is that 35% of the commercially-zoned property in the City is available for adult uses to locate. A-460.

Although it may be true that the Fifth Circuit decision in *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992) and the Ninth Circuit decision in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994) established different standards for whether a city has allowed "reasonable alternative avenues of communication," the standards established by either of those decisions were met in this case. In *Woodall*, the Fifth Circuit concluded that an operator of an adult use is effectively denied a reasonable opportunity to relocate within the

city only if the land that is available has "physical characteristics that render it unavailable for *any kind of development*, or legal characteristics that exclude adult businesses." *Id.* at 1306 (emphasis added). The particular economic factors associated with adult uses would not therefore be relevant.

In *Topanga Press*, the Ninth Circuit concluded that economic impact within an actual business real estate market was a factor in determining whether a specific relocation site could be considered as part of the relevant market. 989 F.2d at 1530. The court reiterated the Supreme Court's admonition that adult businesses "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id.* at 1529, *quoting Renton*, 475 U.S. at 54. The Ninth Circuit interpreted *Renton* as prohibiting "consideration of economic impact *within* an actual business real estate market [and allowing] consideration of cost to determine whether a specific relocation site *is part* of the relevant market." *Id.* at 1530 (emphasis in original).

While *Woodall* and *Topanga Press* establish different standards, certiorari need not be granted in this case because both standards were met in this case. Contrary to petitioners' assertion, the Eighth Circuit opinion is not at odds with *Topanga Press* and further review is not needed on that ground.

The district court's findings fully comport with the *Topanga Press* case. The court noted that much of the land was vacant, but that that condition "is typical for most of the City's *commercially available* land." *Schneider*, 800 F. Supp. at 823 (emphasis added). Petitioners do not dispute

that commercial enterprises in the City would compete for commercially-zoned, vacant property. Petitioners only argue that their business would not succeed on one of these sites. This argument contradicts the district court's finding that petitioners could acquire and subdivide a five-acre lot and build a comparable structure for only $2,000 more than the appraised value of petitioners' existing property. *Id.* at 818, 821. That argument also directly contradicts the *Topanga Press* decision, where the court emphasized that "it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business." *Topanga Press,* 989 F.2d at 1531.

Nothing in the Eighth Circuit opinion conflicts with the *Topanga Press* conclusion that relocation sites must be located within an actual commercial market. Indeed, the court held that the Ordinance provided petitioners with potential sites in "accessible commercially zoned areas." *Holmberg,* 12 F.3d at 144.

CONCLUSION

For the above stated reasons, the City requests that the Petition be denied.

Dated: June 9, 1994.

Respectfully submitted,

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